

Saunders Ventures, Inc. v Morrow
2013 NY Slip Op 31447(U)
June 20, 2013
Supreme Court, Suffolk County
Docket Number: 33638/2011
Judge: Emily Pines
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SHORT FORM ORDER

INDEX NO. 33638-2011

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

*Present:*HON. EMILY PINES

J. S. C.

Motion Date: 10-26-2012
 Submit Date: 06-18-2013
 Motion No.: 002 MOTD

_____ X
**SAUNDERS VENTURES, INC., d/b/a SAUNDERS
 and ASSOCIATES,**

Plaintiff,**- against -**

**SUSAN DAVIDSON MORROW, LAURA
 DAVIDSON TWEEDY, AS SUCCESSOR
 TRUSTEES OF THE SHIRLEY V. DAVIDSON
 FAMILY TRUST, AND DOUGLAS ELLIMAN,
 LLC., d/b/a PRUDENTIAL DOUGLAS ELLIMAN
 REAL ESTATE,**

Defendant.

Attorney for Plaintiff
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 Centereach, New York 11934

Attorney for Defendant
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 Southampton, New York 11968

In this action, the plaintiff, Saunders Ventures Inc. ("Plaintiff"), a licensed real estate broker, seeks to recover a commission from defendants Douglas Elliman, LLC ("DE"), B & H Associates of NY, LLC ("B&H") and Susan Davidson Morrow and Laura Davidson Tweedy as successor trustees of the Shirley V. Davidson Family Trust (the "Trust"), in connection with the sale of real property located in Bridgehampton, New York (the "Property"). Plaintiff alleges that DE and/or B&H were the exclusive listing brokers for the Property and that the Trust was the owner/seller.

Factual and Procedural Background

Plaintiff alleges that in May 2011, Dawn Brennan Hagen (“Hagen”), a licensed real estate sales person employed by Plaintiff, informed Daniel Shedrick (“Shedrick”) of the availability of the Property for sale, and that she subsequently toured the Property with Shedrick. Plaintiff alleges that Shedrick communicated his offer to purchase the Property for \$3,600,000 to DE or B&H and that the offer was accepted by the Trust. According to Plaintiff, both Plaintiff and DE/B&H were signatories to an agreement entitled “Universal Co-Brokerage Agreement 2007” constituting “the rules, procedures and requirements with respect to the Co-Brokerage of Exclusive sales and Exclusive rental listings of residential and commercial property through [the Open RealNet Exchange system] by the Exclusive Broker . . .”

In June 2011, a contract of sale for the Property was executed between Shedrick and the Trust. The contract provided, in relevant part, as follows:

27. Broker. Seller and Purchaser each represents and warrants to the other that it has not dealt with any broker in connection with this sale other than Saunders & Company Real Estate & Prudential Douglas Elliman Real Estate (“Broker”) and Seller shall pay broker any commission earned pursuant to a separate agreement between Seller and Broker. Seller and Purchaser shall indemnify and defend each other against any costs, claims and expenses, including reasonable attorneys’ fees, arising out of the breach on their respective parts of any representation or agreement contained in this paragraph.

Plaintiff alleges that at the closing the Trust’s attorney refused to pay Plaintiff a portion of the selling broker’s commission in the sum of \$54,000. Plaintiff contends that Hagen “initiated the chain of events which led to the sale of the Property and was thus the procuring cause of the transaction.”

Amended Verified Complaint

The Amended Verified Complaint asserts three causes of action. The first cause of action is asserted against the trustees of the Trust, as sellers of the Property, and alleges that Plaintiff was a third-party beneficiary of the contract of sale between the Trust and Shedrick, and that pursuant to the contract of sale the trustees were obligated to pay Plaintiff a commission of \$54,000. The second cause of action alleges that DE and B&H failed to pay Plaintiff a commission pursuant to the Universal Co-Brokerage Agreement. The third cause of action alleges that DE or B&H directed the Trust to remit the entire commission to DE or B&H and not to remit a commission to Plaintiff.

Issue was joined by the Trust by service of a Verified Answer dated March 28, 2013. Issue was joined by DE and B&H by service of a Verified Answer dated April 2, 2013.

Motion for Summary Judgment by DE and B&H¹

DE and B&H now move (Mot. Seq. 002) for summary judgment dismissing the complaint as asserted against them. In support of their motion, DE and B&H submit, among other things, an affidavit from Melissa Osborne, a licensed real estate sales person in New York employed by B&H. Ms. Osborne met Shedrick in 1994, co-habitated with him from 1997 through 2006, and maintained a professional relationship with him thereafter. Osborne claims that she introduced Shedrick to the Property in 2010 and that thereafter Shedrick communicated to her that he was interested in the Property and she “began the process of bringing together a meeting of the minds as to the essential terms” of the transaction. Osborne states that she conducted numerous walkthroughs of

¹Initially, Plaintiff moved for summary judgment. However, Plaintiff subsequently withdrew its motion and counsel for the parties stipulated that the affidavits and exhibits submitted by Plaintiff in support of its motion for summary judgment would be considered by the Court in deciding the motion for summary judgment by DE and B&H.

the Property with an agent from The Corcoran Group, the exclusive listing broker of the Property at that time, and that she obtained topographical maps, surveys, covenants and restrictions, aquifer information, and many other documents relating to the Property in order to help facilitate the closing of the transaction. Osborne states that Shedrick chose not to purchase the Property at that time.

In January 2011, B&H obtained an exclusive listing for the Property at which time the Trust reduced the asking price. Immediately upon learning of the price reduction, Osborne contacted Shedrick to inform him. Shedrick communicated to Osborne that he was again interested in the Property and she restarted the process of bringing together a meeting of the minds by working with her colleague, Jeanine Edington. Osborne conducted numerous walkthroughs of the Property with Edington and Shedrick, and she obtained topographical maps, surveys, covenants and restrictions, aquifer information, and many other documents relating to the Property. Osborne states that Shedrick negotiated with B&H through Edington and her in an attempt to arrive at an agreement. There was no communication or contact between Osborne and any licensed salesperson working with or for Plaintiff or any of its agents in the negotiation of the transaction. Shedrick and the Trust entered into a Memorandum of Sale on June 10, 2011. Thereafter, Shedrick informed Osborne that his partner had already been introduced to the Property by another broker before the Memorandum of Sale was entered into, and that B&H would have to share the commission with the other broker. Osborne claims that at Shedrick's direction, Shedrick's attorney inserted Plaintiff into the contract of sale as a procuring broker. Osborne did not become aware of the identity of the other broker, Dawn Brennan Hagen (hereinafter "Hagen"), until just prior to July 29, 2011, the date of the first scheduled closing. According to Osborne, Hagen only performed due diligence for Shedrick and did not procure a ready, willing and able buyer.

DE and B&H also submit an affidavit from Thomas J. Osborne, Esq., the attorney that represented the Trust in the transaction, who states, among other things, that he was unaware that Shedrick's attorney had inserted Plaintiff in the broker's paragraph of the contract of sale, "as it had not been discussed or negotiated."

An affidavit is also submitted from David A. Nadel, Esq., an attorney and member of the office of house counsel for DE, who states, among other things, that DE was not the brokerage of record for the transaction and that the brokerage of record was B&H. Thus, Nadel contends that DE is not a proper party to this action.

DE and B&H argue, among other things, that summary judgment dismissing Plaintiff's Amended Verified Complaint should be granted because the evidence demonstrates, as a matter of law, that Plaintiff's employee, Hagen, did not procure a ready, willing and able purchaser for the Property on the essential terms of the transaction. According to DE and B&H, none of the work performed by Hagen went towards bringing together a meeting of the minds on the essential terms of the transaction as Hagen's work was solely due diligence. DE and B&H contend that Plaintiff is not entitled to a commission under the Universal Co-Brokerage Agreement 2007 because Plaintiff did not procure Shedrick as the buyer of the Property. Additionally, DE and B&H argue that the inclusion of Plaintiff as a broker in the contract of sale does not constitute an agreement entitling Plaintiff to a commission because the contract of sale is not between Plaintiff and DE/B&H.

In opposition to the motion for summary judgment, Plaintiff submits, among other things, an affidavit from Shedrick wherein he states, among other things, that he contacted Hagen in the spring of 2011 and informed her that he was interested in purchasing property. In a subsequent conversation, he and Hagen discussed the availability of the Property. Hagen informed him that DE had an exclusive listing for the Property but that her agency (Plaintiff) would be able to arrange a sale of the Property with the commission to be divided between the listing broker and the selling agent. Thereafter, Shedrick walked the Property with Hagen and requested that Hagen obtain extensive information for him so that he could decide whether or not to make an offer to purchase the Property. He told Hagen that he wanted to interface with the listing broker, the sellers and/or their attorney during the course of negotiations. After Hagen provided Shedrick the information he requested, he made offers to purchase the Property to DE's agent, Jeanine Edington. Ultimately, Shedrick agreed to purchase the Property

for \$3,600,000. Shedrick subsequently reviewed a contract of sale prepared by the Trust's attorney with his attorney and a provision was added to the contract designating Plaintiff as one of the procuring brokers. The contract was ultimately signed by Shedrick and on behalf of the Trust. Shedrick did not attend the closing, at which the Trust refused to pay Plaintiff a commission on the transaction, but he decided to close title and agreed to support Plaintiff in its efforts to collect the commission Hagen had worked so hard to earn. Shedrick admits that Melissa Osborne did initially inform him of the existence of the listing of the Property, but only after he advised her of his interest in possibly purchasing it. Shedrick states that Osborne was not able to give him the data on the Property he needed to complete his due diligence. According to Shedrick, Hagen actively represented the interests of the Trust in her efforts to convince Shedrick to purchase the Property. He states that the Property would not have been purchased absent Hagen's efforts.

Plaintiff argues, among other things, that DE and B&H's motion for summary judgment should be denied because there is a question of fact as to whether Hagen, as Plaintiff's agent, procured Shedrick as the buyer of the Property, thereby entitling Plaintiff to a commission from DE and B&H pursuant to the Universal Co-Brokerage Agreement 2007.

Discussion

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2nd Dept. 1996]).

“A real estate broker is entitled to recover a commission upon establishing that it ‘(1) is duly licensed, (2) had a contract, express or implied, with the party to be charged with paying the commission, and (3) was the procuring cause of the sale’” (*Hentze-Dor Real Estate, Inc. v D’Allessio*, 40 AD3d 813, 815 [2d Dept 2007], quoting *Stanzoni Realty Corp. v Landmark Props. of Suffolk, Ltd.*, 19 AD3d 582, 583 [2005]).

Here, DE is entitled to summary judgment as the uncontradicted evidence establishes that it was not the brokerage of record for the sale of the Property to Shedrick. Therefore, the complaint is dismissed as asserted against DE.

However, B&H’s motion for summary judgment is denied. The second cause of action alleges that B&H breached the Universal Co-Brokerage Agreement 2007 by failing to pay Plaintiff the sum of \$54,000 as its commission on the sale of the Property. It is undisputed that Plaintiff and B&H are both signatories to the Universal Co-Brokerage Agreement 2007. B&H concedes that it is the brokerage of record for the sale of the Property to Shedrick. Thus, with regard to the transaction at issue, paragraph 2 of The Universal Co-Brokerage Agreement obligates B&H, as the “Exclusive Broker,” to pay a commission to Plaintiff, as the “Selling Broker” if “title passes to a buyer procured by the Selling Broker and the commission is collected by the Exclusive Broker.” It is undisputed that B&H collected the commission at the closing. Thus, the only issue with regard to B&H’s liability for payment of a commission to Plaintiff under the Universal Co-Brokerage Agreement 2007 is whether Plaintiff procured Shedrick as the buyer of the Property.

Whether the broker was the procuring cause of the sale is generally a question of fact for the jury (*Sussdorff v Schmidt*, 55 NY 319 [1873]; *Travis v Bowron*, 138 AD 554 [2d Dept 1910]; *Kronish v Koffman*, 199 AD2d 136, 138 [1st Dept 1993]; *Bersani v Basset*, 184 AD2d 996 [4th Dept 1992]). Where, as here, the broker does not participate in any of the negotiations, the broker must show that he or she created an amicable atmosphere in which negotiations went forward or that he or she generated a chain of circumstances that proximately led to the sale (*Hentze-Dor Real Estate, Inc. v D’Allessio*, supra at 816). Here, the affidavits in support of and in opposition to the motion contain

conflicting accounts of the facts and circumstances surrounding the transaction and thus demonstrate the existence of issues of fact as to whether Hagen procured Shedrick as the buyer of the Property. For example, Osborne and Hagen each claim that they participated in walkthroughs of the Property with Shedrick and obtained extensive information regarding the Property for him. Moreover, the representation by Shedrick and the Trust in paragraph 27 of the contract of sale that they dealt with Plaintiff as a broker in connection with the sale of the Property is further evidence that Hagen procured Shedrick as the buyer. Thus, there is a question of fact as to whether Hagen created an amicable atmosphere in which negotiations went forward or that she generated a chain of circumstances that proximately led to the sale.

Contrary to B&H's contention, the evidence does not demonstrate, as a matter of law, that Plaintiff breached its fiduciary duty. Moreover, even if B&H breached its duty, it will nevertheless be entitled to a commission if the Trust, as seller, was not prejudiced by the conflict (*see Douglas Holly, Inc. v Rice*, 161 AD2d 560 [2d Dept 1990]).

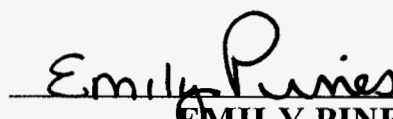
Accordingly, based upon the foregoing, it is

ORDERED that the branch of the motion seeking summary judgment dismissing the Amended Verified Complaint as asserted against DE is granted; and it is further

ORDERED that the branch of the motion seeking summary judgment dismissing the Amended Verified Complaint as asserted against B&H is denied.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: June 20, 2013
Riverhead, New York



EMILY PINES
J. S. C.

☐ Final
☒ Non Final